Nos. 173 and 236

In the Supreme Court of the United States

OCTOBER TERM, 1942

UNITED STATES OF AMERICA, EX REL. MORRIS L. MARCUS AND MORRIS L. MARCUS IN HIS OWN BEHALF, PETITIONERS

v.

WILLIAM F. HESS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA EX REL. SAMUEL OSTRAGER AND SAMUEL OSTRAGER IN HIS OWN BEHALF, PETITIONERS

v.

NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INDEX

CITATIONS

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 173

UNITED STATES OF AMERICA EX REL. MORRIS L. MARCUS AND MORRIS L. MARCUS IN HIS OWN BEHALF, PETITIONERS

v.

WILLIAM F. HESS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 236

UNITED STATES OF AMERICA EX REL. SAMUEL OSTRAGER AND SAMUEL OSTRAGER IN HIS OWN BEHALF, PETITIONERS

v.

NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

On October 12, 1942, this Court granted the petition for writ of certiorari in each of the cases

now at bar and requested the Solicitor General to file a brief amicus curiae. This brief is filed pursuant to that request.[1]

OPINIONS BELOW

The opinion of the circuit court of appeals in No. 173 (R. 471) is reported in 127 F. (2d) 233. The opinion of the district court denying motions for a new trial and judgment n. o. v. (R. 346) is reported in 41 F. Supp. 197.

The opinion of the district court in No. 236 (R. 81), sustaining demurrers to petitioner's complaint is not reported. The opinion of the circuit court of appeals (R. 114) is reported in 127 F. (2d) 647.

JURISDICTION

The judgment of the circuit court of appeals in No. 173 was entered on March 23, 1942 (R. 485). Petition for a writ of certiorari was filed on June 23, 1942, and allowed on October 12, 1942 (R. 546).

The judgment of the circuit court of appeals in No. 236 was entered on April 15, 1942 (R. 118). Petition for a writ of certiorari was filed on July 15, 1942, and allowed on October 12, 1942.

---

[1] By filing this brief the United States does not waive any rights which it may have to share in the judgment secured in No. 173, if the decision of the court below is reversed. Neither does it relinquish any rights that may have accrued in its favor in No. 236, or waive any claims which it may have against respondents in either case in its own name.

The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the act of February 13, 1925.

QUESTIONS PRESENTED

In this brief we have considered only the questions which seemed to be of substance and of public importance. The questions considered are:

1. Whether a private individual is authorized to institute and maintain a suit for double damages and penalties under R. S. 3490–3493 based on facts revealed in an indictment returned by a federal grand jury after a Government investigation.

2. Whether the respondents in either case have engaged in transactions which constitute a violation of R. S. 5438.

3. Whether the respondents are subjected to double jeopardy by a suit for double damages and penalties under R. S. 3490–3493 after they have been indicted for the same transactions and fines have been imposed by the district court.

STATUTES INVOLVED

The statutes primarily involved are R. S. 3490–3493, 12 Stat. 696 (31 U. S. C. 231–234) and R. S. 5438, 12 Stat. 696. These statutes have been printed as an appendix to this brief, together with the Conspiracy Act (Criminal Code, Section 37, 18 U. S. C., Section 88) and Section 9 of the Emergency Relief Appropriation Act of 1935 (49

Stat. 118), which are pertinent to the question of double jeopardy.

STATEMENT

The suit in No. 173 was commenced by the petitioner Marcus in his own behalf and in the name of the United States pursuant to R. S. 3490–3493, on January 25, 1940, to recover damages and penalties allegedly due the United States for violation of R. S. 5438 (R. 5–32). Prior to the filing of the petitioner's complaint the grand jury for the Western District of Pennsylvania on November 3, 1939, returned an indictment against the defendants named in petitioner's complaint charging them with conspiring to defraud the United States in violation of section 37 of the Criminal Code (18 U. S. C., sec. 88) by submitting collusive bids and allocating jobs in connection with certain public works projects (R. 301–329).[2] The defendants subsequently pleaded *nolo contendere* to the indictment and substantial fines were imposed by the district court (R. 295–300). Before the criminal prosecution was concluded the

[2] Other indictments, of which No. 10463 (R. 323–329) was typical, were dismissed at the time the defendants plead *nolo* to the indictment referred to in the text. These indictments charged violations of Section 35 (A) of the Criminal Code (18 U. S. C., Section 80). Whenever reference is made in the remainder of this brief to the indictment against the respondents in No. 173, reference to the indictment to which the defendants plead *nolo*, No. 10462 (R. 301–329), is intended.

complaint in the case at bar was filed, alleging facts substantially identical with those alleged in the indictment.

At the conclusion of the trial in the district court the jury returned a verdict against all but one of the defendants in the sum of $315,100.91 (R. 338). Of the total sum of the judgment $203,100.91 were damages and $112,000 were penalties (R. 338). The district court denied a motion for a new trial and a motion for judgment n. o. v. (R. 346, 387). The circuit court of appeals reversed the decision of the district court, holding that the respondents had not made a claim against the United States within the meaning of R. S. 5438 (R. 471).

The complaint in No. 236 was filed by petitioner Ostrager on February 1, 1940, under R. S. 3490–3493 to recover damages and penalties allegedly due the United States (R. 2–11). Prior to the filing of that complaint the federal grand jury for the Eastern District of Louisiana, New Orleans Division, had returned an indictment against the defendants named in petitioner's complaint, charging them *inter alia* with diverting to their own benefit monies appropriated under the Emergency Relief Appropriations Act of 1935 through collusive bidding on certain public works projects. Pleas of *nolo contendere* were entered by the defendants on January 15, 1940, and fines totaling $5,000 were imposed by the district court. (R.

26–37, 60–81.)[2a] On the same day a complaint and consent decree were filed. Petitioner's complaint was filed on February 1, 1940, based on facts revealed in the indictment.

On December 31, 1940, the district court sustained a demurrer to the petitioner's complaint on the ground that the proceedings in the instant case would subject the defendants to double jeopardy (R. 81). On April 15, 1942, the circuit court of appeals affirmed the decision of the district court, basing its decision upon the opinion of the circuit court of appeals in No. 173 (R. 114).

The remainder of the facts so far as they are relevant to the questions in which the United States is interested will be stated in the argument.

SUMMARY OF ARGUMENT

I

The complaint filed by each of the petitioners is based on facts revealed by an indictment returned by a Federal grand jury after a Government investigation. We believe that the statute under which these actions were brought was intended to authorize a suit by private individuals only when they uncover and prosecute offenses

---

[2a] At the same time another count of the same indictment charging a conspiracy in violation of Section 37 of the Criminal Code (18 U. S. C., Section 88) was *nolle prossed*. Whenever reference is made in the remainder of this brief to the indictment in No. 236, reference to the second count alone is intended.

against the United States and was not intended to permit them to base a suit on facts revealed by prior Government action. If the statute is construed to permit private suits by individuals in cases such as the cases at bar, it will impair rather than promote enforcement of the law.

II

R. S. 5438 contains three separate clauses, each with independent meaning and covering a different offense. Respondents' conduct can be deemed violative of all three clauses, but the third clause is particularly apposite.

Clause one: This clause applies, *inter alia,* to "Every person who * * * *causes to be made* * * * any claim upon * * * the United States * * * knowing such claim to be false * * * or fraudulent." (All italics ours.) Respondents' claims against the municipalities were fraudulent, as respondents knew. It is arguable that respondents *caused* the sponsoring municipalities to present a false or fraudulent claim against the United States and that the fraud in respondents' claims against the sponsors inhered in the latter's claims against the United States.

Clause two: This clause applies, *inter alia,* to "Every person * * * who, for the purpose of * * * *aiding to obtain* the payment * * * of such claim [upon the United States], makes,

[or] uses * * * any false * * * certificate, * * * knowing the same to contain any fraudulent or fictitious statement." Respondents concededly submitted false certificates of non-collusive bidding in support of the great majority of their successful bids. These certificates were made or used for the purpose of aiding to obtain the payment of the sponsors' claims against the United States. The clause does not require that the claim itself be fraudulent.

Clause three: This clause covers "Every person * * * who enters into * * * conspiracy to defraud the Government * * *, by obtaining or aiding to obtain the payment * * * of any * * * fraudulent claim * * *." It is not denied that respondents were parties to a "conspiracy to defraud the Government of the United States." Unlike clause two, which by the use of the words "such claim" plainly refers back to the claim against the United States described in the first clause, clause three refers broadly to "any claim." Clause three thus differs fundamentally from the preceding clauses in that it does not require that the claim be upon or against the United States as long as the United States is to be defrauded. Furthermore, the fraud in obtaining the contracts undoubtedly carried over to respondents' claim for payment under them, even though the claims contained no false statement in themselves. The payments were the ultimate objects

of the fraud, and caused the real damage to the Government.

III

So far as we have been able to ascertain, the principle of double jeopardy has never been applied to actions brought by private persons. To permit suits for damages brought by such individuals to bar the enforcement of the criminal law by public officials might entail serious and unfortunate consequences.

A

The indictments to which the respondents pleaded *nolo* were not brought under R. S. 5438 or its successors, but under the general conspiracy act and Section 9 of the Emergency Relief Appropriation Act of 1935. Since the offenses charged under these statutes require proof of different facts from those required under R. S. 5438, they are not identical, and an action under one does not bar a proceeding under the other.

B

It has frequently been held that suits for penalties may be punitive and therefore subject to the rule against twice being put in jeopardy. *Helvering* v. *Mitchell,* 303 U. S. 391, indicates, however, that the question as to whether a remedy is civil or criminal is one of statutory construction,

with the crucial distinction being between remedial and punitive penalties. The intention of Congress was that the penalties imposed by R. S. 3490 be both civil and punitive. In view of the considerations of policy against treating suits by private persons as criminal, and uncertainty as to the application of the above tests and the decisions, we have come to no definite conclusion as to whether these actions should be held to be civil or criminal.

ARGUMENT

I

R. S. 3490–3493 Do Not Authorize Private Individuals to Institute Actions for Penalties and Double Damages Based Upon Facts Revealed as a Result of an Investigation by the Government

The statute under which the petitioners have instituted the actions now before this Court was enacted on March 2, 1863, 12 Stat. 696 (R. S. 3490–3493, 31 U. S. C., secs. 231–234). From the time of the passage of the Act until the date of the filing of the complaints in the cases at bar there is no reported case in which a private individual brought an action under that statute basing his complaint upon facts revealed in an indictment returned by a federal grand jury or on other pleadings filed by the Government. We believe

that R. S. 3490–3493 was not intended to permit the maintenance of actions such as this where the private individual bringing the suit does not uncover the crime but bases his action upon a proceeding brought by the Government.

The action in No. 173 was commenced in the Western District of Pennsylvania on January 25, 1940, by the petitioner Marcus in his own behalf and on behalf of the United States under the provisions of R. S. 3490–3493 to recover penalties and double damages allegedly suffered by the United States. Prior to the institution of this action, on November 3, 1939, an indictment was returned by the federal grand jury in the same district, after an investigation by the United States, against the same defendants named in the petitioner's complaint, charging them with conspiring to defraud the United States in violation of Section 37 of the Criminal Code (18 U. S. C., sec. 88) by submitting collusive bids and allocating contracts in connection with bids on certain public works (R. 301–322).

On January 5, 1940, the defendants were arraigned and twenty-four defendants entered pleas of *nolo contendere*. Trial was set for February 5, 1940, for the remainder of the defendants, all of whom pleaded not guilty to the indictment. On February 6, 1940, the remainder of the defendants named in the indictment entered pleas of *nolo contendere* and fines in the amount of $54,100 were

imposed by the district court on the defendants (R. 294–300).[3]

While the criminal case was still pending the instant case was filed by the petitioner Marcus on January 25, 1940. The averments of the complaint filed by petitioner Marcus (R. 5–32) are substantially identical with the allegations in the indictment (R. 301–322). Indeed, most of the allegations in the complaint were obviously copied verbatim from the indictment.[4] It is plain that the suit is based upon the facts revealed in the indictment.

The complaint in No. 236 was commenced by the petitioner Ostrager in the Eastern District of Louisiana, New Orleans Division; on February 1, 1940. Prior to the filing of that complaint the federal grand jury for the same district, after an investigation by the United States, returned an indictment against the defendants named in petitioner's complaint, charging them *inter alia* with diverting to their own benefit moneys, appropriated under the Emergency Relief Act of 1935, in connection with bids on cer-

[3] The record shows that all of the defendants named in the criminal suit had entered pleas of *nolo contendere* on January 5, 1940 (R. 295–296). An examination of the docket of the district court and of the files of the Department of Justice show that the record is incorrect and that the facts stated in the text are accurate.

[4] Compare paragraphs 7-9, 11–16 of the complaint (R. 9–13) with paragraphs 5–7 and 9 of the indictment (R. 303–309).

tain public works projects (R. 35–37). On January 15, 1940, the defendants named in the criminal case entered pleas of *nolo contendere* and fines totalling $5,000 were imposed by the district court (R. 61–80).

On February 1, 1940, the petitioner Ostrager filed his complaint (R. 2–11) alleging facts substantially identical with the facts set forth in the indictment. In this case also many of the allegations of the complaint were copied from the indictment, and it is apparent that the action is based upon the facts revealed in the indictment.[1]

Throughout the time during which the cases at bar were pending neither the petitioners nor counsel who, acting at the petitioners' behest, signed the complaint, were officials of the United States or authorized by the Attorney General to act on behalf of the United States in this connection. The Attorney General was not informed prior to the filing of the suits that the petitioners were contemplating such actions and he has not consented to the filing of these actions nor has he subsequently ratified their institution or maintenance. At no stage of the proceedings in the court below in either case has the action been under the control or direction of the Attorney General.

---

[1] Compare paragraphs 11 and 13 of the complaint (R. 7, 8–9) with paragraphs III (1) and Count II of the indictment (R. 29, 35–37).

Inasmuch as the United States had commenced the investigations on its own initiative and obtained indictments, it is reasonable to believe that it would have taken whatever steps were necessary to protect the public interest. Government counsel assumed, however, that separate suits for damages could not be brought after petitioner commenced these actions. Whether the Government would otherwise have brought suits for double damages and penalties under R. S. 3490–3493 or some other appropriate action for damages would have depended upon what steps the Attorney General decided would most adequately protect the public interest, in the light of the questions raised as to the applicability of R. S. 3490 and the principles of double jeopardy.

The filing of the complaints by the two petitioners here apparently has stimulated a number of other private individuals to utilize the results of Government investigations to their own advantage. Since the date when petitioner Marcus filed his complaint, four other suits have been filed by private individuals under R. S. 3490–3493 based upon facts revealed in indictments returned by federal grand juries or based upon facts alleged in a complaint filed by the United States. (*Mandel* v. *Cooper Corporation*, 42 F. Supp. 317 (S. D. N. Y.); *United States ex rel. Brensilber* v. *Bausch & Lomb Optical Co. et al.*, C. C. A. 2, decided November 5, 1942); *United*

States ex rel. Beckhardt v. *Rockbestos Products Corp.*, Civil Action No. 19–142 (S. D. N. Y.); *United States ex rel. Bayarsky* v. *Brooks et al.*, Civil Action No. 1956 (D. N. J.)).*

The institution of actions by private persons in these circumstances is a matter of grave concern to the United States and the United States looks with disfavor upon such actions. The petitioners and other persons who have filed similar actions, although acting presumably as agents and attorneys for the United States, are in fact not acting under the supervision of the Attorney General or exclusively in the public interest. In each case the private individual is seeking a large financial reward without assisting the Government by uncovering an offense against the United States.

To determine whether such results were intended by Congress the statute must be examined in the light of legislative history, the purpose of the act and the evil it was designed to eliminate. That examination shows, we believe, that Congress intended to permit actions by private individuals only when they were actually assisting the enforcement of the law by uncovering and punishing offenses against the United States. The act was not intended as a means of rewarding or benefit-

* One suit was filed after the fact of a Government investigation was publicly disclosed. *United States ex rel. Houlle* v. *Fruco Construction Co.*, No. 1780 (E. D. Mo.), dismissed without prejudice on June 24, 1942.

ing private individuals who are taking advantage of and not aiding law enforcement by the Government.

The instant statute was enacted in 1863 in the midst of a great national crisis. The enforcement of the Federal laws was practically impossible in many parts of the country. All of the energies of the Government were directed towards the prosecution of the war between the states and innumerable opportunities were available, and availed of, for unscrupulous individuals to defraud the Federal Government. At the time of the passage of the Act, the Attorney General lacked an adequate staff, and it was impossible for him to exercise detailed control or supervision over the conduct of litigation in which the interests of the United States were involved. (See Cummings and McFarland, *Federal Justice*, Ch. 11, p. 218 et seq.) The district attorneys responsible for both criminal and civil litigation brought in the name of the United States undoubtedly did not possess the facilities adequately to investigate and prosecute the many persons involved in fraudulent transactions resulting in injury to the United States (Congressional Globe, 37th Cong., 3d Sess., at p. 952; Hockett, *Political and Social Growth of the American People, 1492–1865*, 759). It was as a result of these facts that the statute was passed.

In those circumstances Congress saw fit to delegate to private persons enforcement of federal law to the extent of allowing them to bring actions in

the name of the United States. The situation which was intended to be reached was that in which the private individual uncovered and then prosecuted an offense against the United States. The purpose of the statute is made clear from statements made by Senator Howard in charge of the bill on the floor of the Senate. During the course of the discussion of the Act Senator Howard said (Cong. Globe, 37th Cong. 3rd Sess., pp. 955–956):

> The other clauses which follow, and which prescribe the mode of proceeding to punish persons who are not in the military service of the United States, I take it, are open to no serious objection. The effect of them is simply to hold out to a confederate a strong temptation to betray his coconspirator, and bring him to justice. *The bill offers, in short, a reward to the informer who comes into court and betrays his coconspirator, if he be such;* but it is not confined to that class. Even the district attorney, who is required to be vigilant in the prosecution of such cases, may be also the informer, and entitle himself to one half the forfeiture under the *qui tam* clause, and to one half of the double damages which may be recovered against the persons committing the act. In short, sir, I have based the fourth, fifth, sixth, and seventh sections upon the old-fashioned idea of holding out a temptation, and "setting a rogue to catch a rogue," which is the safest and

most expeditious way I have ever discovered of bringing rogues to justice.' [Italics supplied.]

It is of significance that since the beginning the act has been known as an "informer" statute. The illustration given in the above quotation as to the manner in which the act was designed to operate was of an informer betraying his colleagues. The emphasis was clearly on the bringing to light of information as to wrongdoing which would not otherwise have been unearthed. The reward for the informer was for the disclosure and not merely for the prosecution of the action.

Certainly Congress did not pass the statute in order to permit private persons who had contributed nothing to the discovery of the crime to step in and share the proceeds as soon as the facts had been made known as a result of the Government's own prior investigation. The object of the statute was not to give a bonanza to the person or attorney who was the most diligent in realizing the possibilities of copying the Government's pleading and taking advantage of the information disclosed by the Government's own inquiry. Indeed,

[7] It seems clear from this statement that Congress intended that the United States Attorney, if he uncovered the crime against the United States, should be authorized to commence an action under R. S. 3490–3493 and receive one-half the penalties and damages. The United States Attorney is no longer permitted to receive any compensation other than his salary for performing his official duties (5 U. S. C. 70–71).

if private suits may be brought in these circumstances, races between private counsel to be the first to put a new caption and conclusion on the Government's indictment are quite within the realm of possibility. In such cases the United States would be informing the "informer" rather than the contrary. To construe the act as allowing actions of this type would be an ironic perversion of the legislative purpose.

When the Government has itself already uncovered the fraud, it should be entitled to any recovery which may be obtained in addition to compensatory damages. As petitioner in No. 173 states in his brief (p. 19), one of the objects of the original 1863 act "was to reimburse the Government for the heavy expense of investigation as well as for the loss directly resulting from the fraud." This objective is not obtained when the Government bears the burden of the investigation and a private person keeps the additional recovery.

If the statute is construed to permit informer suits of the character of the suits now before this Court, the enforcement of the law will not be promoted. It is the duty of the Attorney General to enforce the laws of the United States and to take appropriate legal action to protect the public interest. To carry out that duty he is authorized to institute a wide variety of legal actions. When he authorizes the commencement of an investigation he is merely using one weapon in the legal

arsenal of law enforcement that is available to him. In the light of the facts of a particular case he may subsequently decide that the public interest requires the institution of a criminal and a civil proceeding simultaneously, or a criminal proceeding to be followed by a suit for an injunction or for damages. A more complicated situation may require more elaborate legal proceedings; thus a single suit may be part of a more elaborate framework whose over-all purpose is not accomplished when the first complaint or indictment is filed.

On the other hand, the Attorney General may decide that the public interest requires that an action should be temporarily delayed or postponed. For example, at the present time he may decide that a particular action would injure the war effort and should not be now initiated. Moreover, the filing of a suit in one case may adversely affect another suit. Effective law enforcement dictates that the control of litigation on behalf of the United States be under the direction of the Attorney General who is able to act at all times exclusively in the public interest.

If it is possible for a private individual to commence an action after the Attorney General has instituted proceedings, but before action by the United States is yet complete, then it is no longer possible for the Attorney General to control proceedings brought on behalf of the United States in such a way as to protect the public interest.

Such a private suit may prevent the Government from taking steps which it believes are essential to the protection of the public in connection with the instant suit or in connection with a different suit. Moreover, the likelihood of suits of this nature would impede the expeditious disposition of criminal cases, since defendants who would otherwise plead guilty or *nolo* might well be less willing to do so if further litigation would be encountered. Consequently, we believe that private suits of this nature brought by individuals who are not responsible to the Attorney General are likely to lead to extensive abuses and to situations in which enforcement of the law is hindered and not promoted.

We have already referred to the likelihood of an unseemly race by outsiders for the opportunity of profiting from the disclosures revealed by the Government's own investigation. Success in such a test of speed and foresight would not necessarily go to the counsel best prepared to protect the Government's interests. Moreover, commencement of a suit by a private person as relator for the United States would probably prevent the Government from bringing its own action for damages and recovery by the public treasury of all the damages allowed.

Accordingly, we believe that this Court should construe the statute as not permitting an action to be brought by a private individual after the United States has instituted proceedings with respect to

the same transactions. This interpretation is in accord with the principle that a statute should be construed to give effect to the intent of Congress, determined by an examination of the end sought to be achieved, the subject matter of the statute and its legislative history (*Helvering* v. *N. Y. Trust Co.*, 292 U. S. 455, 464–465; *United States* v. *Katz*, 271 U. S. 354, 357; *Ozawa* v. *United States*, 260 U. S. 178, 194; *United States* v. *Cooper Corp.*, 312 U. S. 600, 605; *Puerto Rico* v. *Shell Co.*, 302 U. S. 253, 258; *Great Northern Ry. Co.* v. *United States*, 315 U. S. 262, 273), and in the light of the evils which the statute sought to correct (*Warner* v. *Goltra*, 293 U. S. 155, 158; *Denn* v. *Reid*, 10 Pet. 524, 527).* The applicable principle was stated by this Court in *Ozawa* v. *United States*, 260 U. S. 178, 194:

> It is the duty of this Court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance, but if this leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its de-

* It is significant in this connection that these cases now at bar are the first reported cases throughout the 79 years during which the statute was effective in which a private individual brought an action based on a previous Government proceedings. (Cf. *United States* v. *Cooper Corp.*, 312 U. S. 600, 613–614.)

> sign and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail. See *Holy Trinity Church* v. *United States*, 143 U. S. 457; *Heydenfeldt* v. *Daney Gold Mining Co.*, 93 U. S. 634, 638. * * *

Moreover, it has been said that informer statutes are disfavored and that they should be strictly construed. As Mr. Justice Brewer, when a circuit judge, declared with reference to a similar statute, in *Taft* v. *Stephens Lith. & Eng. Co.*, 38 Fed. 28 (E. D. Mo.), at p. 29:

> Plaintiff is not suing for the value of his services, or for injury to his property, but simply to make profit to himself out of the wrongs of others; and when a man comes in as an informer, and in that attitude alone asks to have a half million dollars put into his pocket, the courts will never strain a point to make his labors light, or his recovery easy.

Both lower courts in these cases gave effect to this principle. (See also *Ferrett* v. *Atwill*, 8 Fed. Cas. 4747; *United States* v. *Kansas Pac. Ry. Co.*, 26 Fed. Cas. 15,506; *United States ex rel. Bronsilber* v. *Bausch & Lomb Optical Co. et al.*, decided November 5, 1942 (C. C. A. 2); and authorities cited by the court below in No. 173 (R. 474–475).)

We believe that it was error for the courts below to have applied this principle of strict construction to the statutory provisions defining the sub-

stantive offense, inasmuch as the construction of that language affects suits by the United States as well as those brought by informers. The policy of the rule would, of course, not apply to actions by the Government, although the statutory language is the same. For the reasons set forth *infra*, pp. 24 *et seq.*, we believe the construction of these provisions by the circuit courts of appeals to have been erroneous.

But there is good reason for giving a narrow interpretation to the informer's act as applied to the right of private individuals to sue, particularly when this will make the Act conform to the obvious purpose of Congress and obviate consequences which Congress never intended. The policy in favor of a strict construction of informers' statutes is reinforced by the principle referred to above that a statute should be construed so as to achieve the purpose of Congress determined in the light of contemporary circumstances, and to avoid unreasonable consequences not contemplated by the legislature.

II

Respondents' Conduct Violated R. S. 5438 as Incorporated in R. S. 3490

Sections 3490–3493 of the Revised Statutes (31 U. S. C., secs. 231–234) provide that persons committing any of the acts prohibited by R. S. 5438 shall be liable to the United States for double dam-

ages plus $2,000 forfeiture. Such amount may be recovered either by the United States directly (Sec. 3492) or by any other person (Sec. 3491), suing for himself as well as for the United States. The decisions of the courts below holding Section 5438 inapplicable would also bar the Government from bringing its own suit for damages and forfeiture under Section 3492.*

Three separate clauses of Section 5438 have been invoked by petitioners to support their position. The first clause applies to persons who make or *cause to be made* a claim against the United States with knowledge that it is false or fraudulent. The second applies to persons who "for the purpose of obtaining or *aiding to obtain* the payment or approval of *such* claim," knowingly make or use or *"cause to be made or used"* any false document. The third clause applies to persons who enter into any agreement or conspiracy to defraud the United States "by obtaining or aiding to obtain

* The Government would not be precluded from instituting criminal proceedings under either the amended version of Sec. 5438 (18 U. S. C., secs. 80, 83) (*cf. United States* v. *Gilliland*, 312 U. S. 86; *United States* v. *J. Greenbaum & Sons, Inc.*, 123 F. (2d) 770 (C. C. A. 2); *United States* v. *Mellon*, 96 F. (2d) 462 (C. C. A. 2), certiorari denied, 304 U. S. 586), or other statutes such as those invoked in the cases at bar (18 U. S. C., sec. 88; Sec. 9 of the Emergency Relief Appropriation Act of 1935 (49 Stat. 115, 118). However, since R. S. 3490 has not been amended to refer to the amended criminal provisions, civil liability must be determined by reference to the text of R. S. 5438 at the time of its incorporation by reference.

the payment * * * of *any* false or fraudulent claim." (All italics ours.) Both of the circuit courts of appeals in these cases directed their attention exclusively to the first of these clauses and held it inapplicable. They ignored the other two clauses, and their reasoning does not apply to some of the language in those clauses.

The circuit courts of appeals held that Section 5438 applied only to claims against the United States, and that the false claims made by respondents were against the municipalities. But the courts apparently did not take note of the provisions in the first two clauses with respect to persons who (1) *cause* a false claim to be made against the United States, or (2) cause to be used any false document for the purpose of *aiding* to obtain the approval of such claim. The courts also apparently overlooked the fact that the third clause is not limited to claims against the United States, but applies to persons who conspire to defraud the United States by aiding to obtain the payment of *any* (not "such") false or fraudulent claim.

It is true that in other cases, in addition to the decisions below, the courts have treated the statute as strictly limited to claims against the United States (*United States ex rel. Kessler* v. *Mercur Corporation*, 137 F. Supp. 742 (S. D. N. Y.), affirmed, 83 F. (2d) 178 (C. C. A. 2), certiorari denied, 299 U. S. 576; *United States ex rel. Salzman* v. *Salant & Salant*, 41 F. Supp. 196 (S. D. N. Y.),

Cf. United States v. *Cohn*, 270 U. S. 339.) But it does not appear that any of the previous cases were concerned with the present situation, or that the courts' attention was called to the importance of the words we have emphasized. In none of the cases was the significant difference between the third clause and the first and second noted.

We think that the facts at bar can fairly be said to fall within all three clauses, and that the third clause, in particular, seems to cover them. We see no reason why the words of the statute should not be given their literal meaning when this will permit the law to reach types of fraud which cause the Government serious injury.[10] Certainly no public policy favors an interpretation of the law in order to protect persons who engage in such conduct. With these considerations in view, we will take up each clause in turn.

It will be helpful to the Court, however, if we first briefly summarize the factual situation involved, as set forth in the more complete record in No. 173. (Unless otherwise indicated, subsequent record references in this brief are to the record in No. 173.)

---

[10] See *United States* v. *Bowman*, 260 U. S. 94, 102, in which the Court said with respect to Section 35 of the Criminal Code, the successor to R. S. 5438:

"* * *. As said in *United States* v. *Lacher*, 134 U. S. 624, 629, quoting with approval from Sedgwick, Statutory and Constitutional Law, 2d ed., 282: 'penal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment.' They are not to be strained either way."

As required by its regulations (44 C. F. R. 216.2–216.3), P. W. A. participation in financing the projects was initiated by a written application from the local governmental agency (the "sponsor" or "owner") for a grant (R. 82, 537), accompanied by a detailed estimate of the cost of the project, broken down according to type of work (R. 498). After checking the estimates, P. W. A. made a formal offer to the sponsor, which generally was to pay 45% of the actual cost, but not to exceed a sum representing 45% of the estimated cost as approved by it (R. 498–500, 520). This offer incorporated by reference (R. 179–180, 497–498) the standard terms and conditions prescribed in P. W. A. Form 230 (157–179), which required, among other things, that "all work on the project * * * be done by contract," that "the applicant give every opportunity for free, open and competitive bidding for each and every construction, material and equipment contract" and that "The Applicant will give such publicity to advertisements or calls for bids by it * * * for the furnishing to it of work, labor, materials, and equipment as will provide adequate competition and the award of each contract therefor will be made to the lowest responsible bidder as soon as practicable" (R. 167). The acceptance of the offer created the contract between the sponsor and P. W. A. (R. 116–117, 180, 181–184, 497–498, 500–501).

The sponsors then advertised for bids on the work required by the projects, the advertisements

showing on their faces that P. W. A. projects were involved (R. 43–44, 87, 217–218, 495–496). Respondents, acting pursuant to their collusive arrangement, were among the successful bidders (R. 11–14, 225–226, 274–276). At the request of the sponsors, the respondents generally submitted to the sponsors certificates to the effect that their bids were "genuine and not sham or collusive" (R. 226, 49, 14), which apparently were retained in the sponsor's files (R. 51–52). The terms upon which the federal grants were made required the sponsors to submit to P. W. A., for its approval, proposed contract documents before they advertised for bids and the executed contract documents before the commencement of work on the projects (R. 502, 179, 157, 165, 275).

In accordance with the P. W. A. regulations (44 C. F. R. 237.8), the respondents submitted their claims for payment, as their work progressed, on P. W. A. Form I-23, entitled "Periodical Estimate for Partial Payment" (R. 118–119, 202–207), which, of course, indicated that the project was financed by P. W. A. Before payment was made to respondents by the sponsors, these estimates were subject to the approval of the local P. W. A. representative (R. 40–41, 118–119, 207, 493–494, 499, 502, 503, 504–505).

As required under the agreement between the sponsors and P. W. A., payments for work on the projects were made by the sponsors from a sepa-

rate "Construction Account"(s), in which both the federal grant funds and the funds supplied by the sponsors were kept, and from which accounts all payments for the construction of the projects were made (R. 163, 64, 71–72, 89, 97, 107). The construction accounts were kept in the names of the sponsors and payments from them were made by the sponsors, by the signatures of the sponsors' officials (R. 57–58, 60–68, 104). As specified in the P. W. A. regulations (44 C. F. R. 230.21–230.25) and the agreement between the sponsors and the P. W. A. (R. 157, 160–163), the federal grant funds were advanced periodically, after detailed audits of the status of the projects by P. W. A. representatives (R. 53, 507). During the progress of the work, the projects were under steady surveillance by P. W. A. representatives (R. 69, 79, 80, 86, 95, 503, 529–530).

The jury's verdict established that the effect of respondents' collusive bidding was substantially to increase the amount expended by the United States on the projects in question (R. 142, 338, 389).

1. THE FIRST CLAUSE OF R. S. 5438

This clause covers:

> Every person who makes or *causes* to be made, or presents or *causes* to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United

> States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent * * * [Italics supplied.]

In our view the possibility of applying clause one to the facts at bar rests chiefly upon the coverage of persons *causing* the presentment of the proscribed claims. Unquestionably, respondents *caused* the municipalities to present to the United States claims to cover the payments made by the municipalities to respondents. The real issue is whether the claims which the sponsoring municipalities indubitably made "upon or against the Government of the United States" can be said to be "fraudulent", even though the sponsors themselves were innocent, because, as shown *infra*, pp. 40–44, respondents' claims upon the sponsors were fraudulent.

We think there is no substantial question concerning respondent's guilty knowledge. They cannot disclaim knowledge of their own actions which occasioned the fraud, if any, in the sponsors claims, and so can scarcely deny acquaintance with the true nature of the sponsors' claims against the United States. Nor can they claim ignorance of the fact that the sponsors were obtaining financial assistance from the United States to pay for the projects. P. W. A. Form I–23, on which respondents submitted their claims (R. 118–119, 202–207), expressly declared that the United States was aiding in the financing of the project involved and specifically called attention to the penalties for presenting false claims to the United States (R.

204). The contract documents, including the advertisements for bids and the bids themselves were replete with references to the fact that P. W. A. projects were involved (R. 217, 223, 225, 231, 232, 236, 495–496). Indeed, it is difficult to see how respondents can disavow knowledge of the relationship between the sponsors and the United States in view of their previous pleas of *nolo contendere* to an indictment charging conspiracy to defraud the United States in connection with their collusive bids on the same projects involved here (R. 301, 307; No. 236, R. 60–81).

It is at least arguable, if not clear, that the fraud in respondents' claims against the sponsors inhered in the sponsors' claims against the United States.[11]

[11] P. W. A. form 230 (R. 157–179), specifying terms and conditions to which the Government's offer to the sponsor was expressly subject (R. 179), required that the sponsor "give every opportunity for free, open, and competitive bidding" (R. 167). The record shows several instances where P. W. A. authorities, upon suspecting collusion in the bidding, withheld the payment of claims made by the sponsors (R. 46–48, 195–196).

The argument for holding respondents liable for causing the sponsors to submit fraudulent claims upon the government would be stronger if the certificates of non-collusion had actually been presented to the P. W. A. authorities. However, although the obligation of the United States to make the grants was expressly contingent upon the submission to the P. W. A. of proposed contract documents prior to the sponsors' advertisement for bids and of executed contract documents before the work commenced (R. 179, 157, 165), which documents included the bid proposals (R. 275), it appears that the certificates of non-collusion were not required by, or submitted to, P. W. A., but were obtained by the sponsors and retained in their files (R. 49, 51–52).

The sole purpose of the sponsors' claims was to enable them to obtain the means to meet their obligations to the parties, including respondents, with whom they had contracted for work on the projects. Certainly respondents' fraud tended to swell the amount of the P. W. A. grants, which were computed on a cost percentage basis. The good faith of the municipality should not shield respondents. An innocent agent may be a conduit of another's crime or fraud. Cf. *United States* v. *Gooding,* 12 Wheat. 460, 469; *Belvin* v. *United States,* 260 Fed. 455 (C. C. A. 4); *United States v. Carlin,* 259 Fed. 904 (E. D. Pa.); see *United States* v. *Cohn,* 270 U. S. 339, 344.[12]

2. THE SECOND CLAUSE OF R. S. 5438

The second clause of R. S. 5438 covers:

> Every person * * * who, for the purpose of obtaining or *aiding* to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing

[12] Petitioners' argument for liability under clause one in reliance solely upon respondents' own claims, citing *Madden* v. *United States*, 80 F. (2d) 672, 676 (C. C. A. 1), *Langer* v. *United States*, 76 F. (2d) 817, 823 (C. C. A. 8), and *United States* v. *Harding*, 81 F. (2d) 563, 568 (App. D. C.), at the least requires the interpretation of "claims upon or against the Government of the United States" to apply to claims upon or against *funds* of the United States. This would

> the same to contain any fraudulent or fictitious statement or entry, * * *. [Italics supplied.]

Clause two brings squarely into focus the certificates or affidavits of non-collusive bidding concededly submitted in support of the great majority of the successful bids involved here and by almost all of the respondents (R. 49, 225–226, 325). These were admittedly false. And the text of the statute is plain that the offense defined in clause two is complete if the false document is made or used for the prescribed purpose of obtaining or aiding to obtain the payment or approval of a claim against the United States, without proof of the

---

hardly be consonant with the language in *United States* v. *Cohn*, 270 U. S. 339, where it said (270 U. S., at 345–346):

"* * * it is clear, in the light of the entire context, that in the present statute, the provision relating to the payment or approval of a "claim upon or against" the Government relates solely to the payment or approval of a claim for money or property to which a right is asserted against the Government, based upon the Government's own liability to the claimant. * * *"

If this is the proper definition of "a claim upon or against * * * the United States" within the meaning of the statute, respondents' own claims hardly fit within that category. Their contracts being concededly solely with the sponsors (R. 274), they could not have sued the Government. *Cf. United States* v. *Sherwood*, 312 U. S. 584, 589. Nor did the Government's exercise of control over the disbursement of its grant funds under respondents' contracts with the sponsors involve the assumption of any liability on its part. *Cf. United States* v. *Algoma Lumber Co.*, 305 U. S. 415, 421–423.

bona fides of the claim[13] and whether or not the claim is ever actually presented for payment or approval.

Hence the sole question concerning the application of the second clause is a factual one: namely, whether respondents made or used the certificates for the purpose of aiding to obtain the payment of the sponsor's claims against the United States, as well as to facilitate payment of their own claims against the sponsors. On this question we think that the circumstances noted above, pp. 31–33, amply sustain the conclusion that the certificates were made or used for the prohibited purpose. With the knowledge that P. W. A. projects were involved, it was clearly to the interest of respondents to facilitate the consummation of the federal aid which furnished part of the funds from which they were paid. The statute does not require that the prohibited purpose should have been the exclusive purpose of the respondents (*cf. Belvin* v. *United States*, 260 Fed. 455, 456–457 (C. C. A. 4); *United States* v. *Anderson*, 101 F. (2d) 325, 330–331, 333 (C. C. A. 7), certiorari denied, 307 U. S. 625), or that the false writing should have

[13] The lower courts are divided as to whether clause two requires a showing that the claim itself, as distinguished from the false supporting document, is fraudulent. Compare *United States* v. *Jones*, 32 Fed. 482, 483 (D. S. C.) with *United States* v. *Miskell*, 15 Fed. 369, 370 (C. C. Ky.), and *United States* v. *Jennison*, 26 Fed. Cas. No. 15,475 at 609 (C. C. Kan.). If, however, such a showing is required, it can be made out on the analysis set out, *supra*, at pp. 31–32.

actually been brought to the attention of the United States or have actually induced reliance (*cf. Kay* v. *United States*, 303 U. S. 1, 5–6). Indeed, as we have noted, clause two does not even require presentment, much less payment or approval, of the claim itself.

3. THE THIRD CLAUSE OF R. S. 5438

The third clause of R. S. 5438 covers:

> Every person * * * who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim * * *.

There is no question here as to whether the respondents were parties to "any agreement, combination, or conspiracy to defraud the Government of the United States." Aside from respondents' previous pleas of *nolo contendere* to an indictment charging conspiracy to defraud the United States, the verdict of the jury in the trial in the district court in the *Hess* case, particularly when viewed in the light of the court's charge (R. 133–134, 138–139, 142) likewise constitutes a clear finding that respondents conspired to defraud the United States.

Nor is there any question as to whether respondents' fraud upon the United States was to be, and was in fact, accomplished by obtaining the pay-

ment or allowance of claims. The I–23 forms on which respondents submitted their demands for payment (R. 118–119, 202–205) were claims in the strictest sense of the word (*cf. United States* v. *Cohn*, 270 U. S. 339, 345–346). Neither is there any question of guilty knowledge involved here. The respondents were fully aware of the nature of the claims they presented.

The real questions under the third clause are (a) whether the reference to "claim" in that provision means the "claim upon or against the Government of the United States" described in the first clause of R. S. 5438, and (b) whether respondents' claims were "fraudulent."

(a) *Whether the reference to claim in clause three of R. S. 5438 means "a claim upon or against the Government of the United States"*

The third clause of R. S. 5438 differs fundamentally from the first two clauses in that there is no requirement that the claim be upon or against the United States. Clause three, unlike clause two, which by the use of the words "such claim" plainly refers back to the claim against the United States described in clause one, refers broadly to *any* claim. The difference in phraseology cannot be assumed to have been unintentional. The third clause, with its general reference to any conspiracy to defraud the United States, is undoubtedly more sweeping in scope than the preceding provi-

sions. The original sponsor of the statute characterized the offence defined by this clause, in contrast to his more limited description of the offenses covered by the first two clauses, as "conspiring to cheat the United States" (Cong. Globe, 37th Cong., 3d Sess., part II, pp. 952–953), an explanation wholly consistent with the breadth of the language actually used and implying no intention to limit its application solely to claims "upon or against the Government of the United States". A contrary construction of R. S. 5438 would fail to reach sub-contractors who conspired to defraud the United States by fraudulently inflating their claims against contractors working under cost-plus Government contracts. Similar language in the general conspiracy statute (Criminal Code, Sec. 37, 18 U. S. C., sec. 88) has been interpreted broadly enough to cover the facts of this case (*Belvin* v. *United States*, 260 Fed. 455 (C. C. A. 4) (conspiracy to defraud United States by padding wage claims made to cost-plus contractor); *United States* v. *Carlin*, 259 Fed. 904 (E. D. Pa.); *cf. United States* v. *Walter*, 263 U. S. 15, 18).

That the courts will heed such evidence of legislative intention as the distinction between the reference to "such" claims in the second clause and to "any" claims in the succeeding clause appears from the interpretation given a statute which furnishes a remarkably close parallel to R. S. 5438. Section 29 of the Criminal Code (3 Stat. 771, 18

U. S. C., sec. 73) also has three clauses.[14] The first makes it unlawful to forge or counterfeit any writing, the second to utter or publish as true any *such* forged or counterfeited writing, and the third to present to any officer of the United States *any* writing with intent to defraud. The language used by the courts in rejecting the argument that the third and second clauses cover the same documents can be applied almost without change to the third clause of R. S. 5438. In *United States, ex rel. Starr* v. *Mulligan*, 59 F. (2d) 200 (C. C. A. 2), the court, in passing upon the Government's contention that the second clause covered the petitioner's case, declared (59 F. (2d) at 201):

> * * * To do this necessitates disregarding the word "such", inserted in the second and omitted in the third clause. The pres-

[14] This section reads as follows:

"(1) Whoever shall falsely make, alter, forge, or counterfeit * * * any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving * * * from the United States, or any of their officers or agents, any sum of money; or

"(2) whoever shall utter or publish as true * * * *any such* false, forged, altered, or counterfeited deed, power of attorney, order, certificate, receipt, contract, or other writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; or

"(3) whoever shall transmit to, or present at * * * any office or officer of the Government of the United States, *any* deed, power of attorney, order, certificate, receipt, contract, or other writing, in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited, shall be fined * * * and * * * imprisoned * * *." [Italics and numbers supplied.]

> ence of "such" limits the scope of the second clause to such writings as are described in clause 1, and results in a consistent interpretation of the whole section. * * *

With respect to the same provision this Court declared in *Davis* v. *United States*, 231 U. S. 183, 188–189:

> * * * The context of the section reinforces this view, since the contrast between the narrow scope of the first two paragraphs and the enlarged grasp of the third shows the legislative intent, after fully providing in the first two paragraphs for forged and counterfeited documents, instruments, etc., to reach by the provisions of the third paragraph, any and all fraudulent documents, whether forged or not forged, and thus efficiently to deter from committing the wrong which it was the purpose of the section to prohibit. * * *

See to the same effect *United States* v. *Staats*, 8 How. 40, 46–47; *United States* v. *Barney*, 24 Fed. Cas. No. 14,524, at 1012–1013 (C. C. S. D. N. Y.).

In none of the cases relied on by respondents in the court below in No. 173 was there any discussion of the scope of the claims covered by the third clause of R. S. 5438, or any comparison of the language of that clause with that contained in the preceding clauses. We believe the third clause should be construed to mean exactly what it says. See pp. 26–27, *supra*.

(b) *Whether respondents' claims were "fraudulent"*

Although the claim described in the third clause need not be against the United States, it must be false or fraudulent. The collusion practiced by respondents in rigging their bids constituted fraud, making the contracts thereby obtained and the claims made pursuant to the contracts fraudulent. This Court has so held. In *McMullen* v. *Hoffman*, 174 U. S. 639, a suit for an accounting under a partnership agreement between two persons who had entered into a collusive bidding arrangement like those presented here, this Court denied relief, holding (pp. 652–653):

> But in this case there is more even than concealment. There is the active fraud in the putting in of these, in substance, fictitious bids, in their different names, but in truth forming no competitive bids * * *. It is not too much to say that the most perfect good faith is called for on the part of bidders at these public lettings, so far as concerns their position relating to the bids put in by them or in their interest. The making of fictitious bids under the circumstances detailed herein is in its essence an illegal and most improper act; indeed, it is a plain fraud, perpetrated in the effort to obtain the desired result.

See to the same effect *In re Salmon*, 145 Fed. 649, 652–653 (W. D. Mo.).

The contracts obtained by respondents here—the very object of the conspiracy—cannot con-

ceivably be separated from the fraud by which they were procured.

Respondents' attempt to isolate the claims made under the contracts from their fraud in obtaining the contracts cannot be supported. The contention apparently is that although they obtained the contracts by fraud, the claims for payment subsequently presented contained no false statements, and were therefore neither false nor fraudulent. We think it clear, however, that the fraud in obtaining the contracts carried over to respondents' claims for payment under them. The payments were the ultimate objects of the fraud, and it would be absurd to hold that because the claims for payment were separately presented, they were not tainted with the fraud. As a practical matter, the real damage to the Government lies in the payment of claims made under the contracts, rather than in the contracts themselves; if the claims were never presented, there would be no financial loss.

If authority be needed for such an elementary proposition, it can be found in *Crocker* v. *United States*, 240 U. S. 74, which held that an undercover arrangement by which a government official shared in the profits under a contract with the Government justified a refusal to pay the claim under the contract. There, as here, the claim itself contained no express misrepresentations, but the Court said (p. 81):

> Of course, the secret arrangement with Machen operated to vitiate the company's contract and justified the Postmaster General in rescinding it on discovering the fraud. * * *
>
> It results that no recovery could be had upon the contract with the Postmaster General, because it was tainted with fraud and rescinded by him on that ground. * * *

As this Court said in the *McMullen* case with reference to the agreement involved (174 U. S., at 653):

> * * * [The] agreement covered and was clearly intended to cover their whole action from the time they agreed to put in their bids in a common interest up to and including the execution and performance of the contract obtained from the city. * * * No division of that contract into two periods, the one prior and the other subsequent to the written agreement between the parties, can be made. * * *

See to the same effect *United States* v. *Coggin*, 3 Fed. 492 (C. C. E. D. Wis.); *Dimmick* v. *United States*, 116 Fed. 825 (C. C. A. 9); cf. *Pan American Co.* v. *United States*, 273 U. S. 456, 500 *et seq.*; *Causey* v. *United States*, 240 U. S. 399, 402.

Apparently opposed to our view that the respondents' claims were fraudulent is *Mandel* v. *Cooper Corporation*, 42 F. Supp. 317 (S. D. N. Y.). There the court, although seemingly conceding that

the contracts were obtained by "fraudulent misrepresentations," held that claims submitted pursuant to contracts obtained from the United States by collusive bids, "identical to the penny," were not fraudulent "within the meaning of the informer statute." The opinion reasoned that the claims were not "false" or "fictitious" and hence were not "fraudulent."

It is difficult to reconcile the *Mandel* case with *Crocker* v. *United States,* 240 U. S. 74, 81. We believe that the stringent interpretation of the statute in the *Mandel* case, involving the complete emasculation of the word "fraudulent," is doubtless a reflection of the disfavor with which the courts view informers. This recently found sharp expression in *United States ex rel. Brensilber* v. *Bausch & Lomb Optical Co. et al.* (C. C. A. 2, decided November 5, 1942), where the court, affirming summary judgment for the defendants in an informer's action, said with reference to R. S. 5438:

> Furthermore so far as it perpetuates the odious and happily nearly obsolete *qui tam* action, it should be regarded with particular jealousy.[15]

---

[15] The Court below in No. 173 emphasized that its decision was not a bar to other proceedings by which restitution might be secured (R. 479). However, the availability of a common law remedy is no bar to the institution of proceedings under R. S. 3490–3494. Cf. *Pooler* v. *United States,* 127 Fed. 519, 521 (C. C. A. 1).

The opinion in the *Brensilber* case itself raises some doubts as to the validity of the *Mandel* case, even in its own jurisdiction. In Brensilber's case, the defendant by contracts with other producers had apparently secured a monopoly, so that the bids it submitted to the government for the sale of its products, which ripened into contracts, were not in a real sense competitive. The court recognized a distinction between the case before it and a collusive bidding situation, using No. 173 as a contrasting example of facts which might violate the statute in this respect.[15a]

Since respondents' claims were clearly fraudulent, were concededly intended to defraud the United States, and are thus covered by clause three of R. S. 5438, whether or not they were technically "upon or against the Government of the United States", we are of the opinion that respondents violated the statute.

[15a] We believe that the decision of the Circuit Court of Appeals in the *Brensilber* case, *supra*, is correct so far as relied upon in the text. However, we think the court erred in limiting the scope of the fraud condemned by 31 U. S. C. 231 to the "accepted sense of deceit." We believe that fraud as used in this statute covers a broader ground than the ancient crime of false pretenses. See *Bradford* v. *United States*, 129 F. (2d) 274 (C. C. A. 5), certiorari denied November 23, 1942, No. 455, this Term; *Pandolfo* v. *United States*, 128 F. (2d) 917 (C. C. A. 10), certiorari denied, October 12, 1942, No. 223, this Term; *United States* v. *Groves*, 122 F. (2d) 87, 90 (C. C. A. 2), certiorari denied, 314 U. S. 670; *Leche* v. *United States*, 118 F. (2d) 246 (C. C. A. 5), certiorari denied, 314 U. S. 617; *Shushan* v. *United States*, 117 F. (2d) 110, 115 (C. C. A. 5), certiorari denied, 313 U. S. 574.

III

The Question of Double Jeopardy

Respondents in these cases have contended that their convictions in the criminal proceedings previously brought by the United States barred the instant suits. This contention that the suit for penalties placed the respondents in jeopardy a second time for the same offense, in violation of the Fifth Amendment, was accepted by the district court in No. 236 (R. 85–89) but rejected by the district court in No. 173 (R. 360). The circuit courts of appeals did not pass upon the question, although the Fifth Circuit intimated in No. 236 that it probably would agree with the decision below on the point (R. 116–117).

The issue presented is difficult and novel. So far as we have been able to ascertain, these are the first cases since the original statute was passed in 1863 in which the same person has been both prosecuted criminally and then sued under R. S. 3490. The Government itself has not, to our knowledge, brought both types of proceedings against the same person. Although there is no decision on the point, there is a dictum, in a suit arising under Section 3490, but involving a different question, that "where provision is made by statute for the punishment of an offense by fine or imprisonment, and also for the recovery of a penalty for the same offense by civil suit, a trial and judgment of conviction in the criminal pro-

ceeding is a bar to the civil suit and a trial and judgment for the plaintiff or defendant in the civil suit is a bar to the criminal proceedings" (*United States* v. *Shapleigh,* 54 Fed. 126, 134 (C. C. A. 8)).

The *Shapleigh case* was brought by the Government itself. The present suits were brought by private individuals, in the name of the Government and partially on the Government's behalf. We have been able to find no cases in which the principle of double jeopardy has been applied to actions by private persons. From the standpoint of the defendants, however, in cases brought under R. S. 3490 it seems immaterial whether the suit is brought by the Government or by another on the Government's behalf, and if Section 3490 is regarded as a criminal or primarily punitive statute, it would be difficult to differentiate between suits brought by the United States and suits by private persons.

The unusual character of the suggestion that a suit by a private person should be treated as in the same class for purposes of jeopardy as one brought by the Government makes it desirable to consider the consequences of such a ruling. If, as in these cases, the Government brought its criminal proceeding first, a claim that a civil action for penalties and double damages could not then be brought would not be likely to interfere with the public in-

terest in effective law enforcement.[16] But the principle of double jeopardy works both ways. If the suit for penalties is regarded as sufficiently punitive to be barred by prior criminal proceeding, a criminal prosecution would be barred if the penalty suit were brought first. We think that to permit a suit brought by a private person to bar the enforcement of the criminal law by public officials might entail serious and unfortunate consequences.

If the two types of action should be mutually exclusive, the officials of the Government whose duty it is to enforce the law so as most effectively to protect the public interest would ordinarily decide which procedure should be followed. Often the criminal punishment, with the threat of imprisonment, would provide a more effective sanction and be a greater deterrent to future crime, even though the financial return to the Government might be less. A private individual would not likely be affected by such considerations. He would be able to secure one-half of the proceeds only if the penalty suit were brought—and only if it were brought first, and by him. The result would be that private individuals, acting solely in their own pecuniary interest, would be able to block the bringing of criminal proceedings.

Another danger should be mentioned. If it is held that a private penalty suit under Section 3490

[16] Even if R. S. 3490 were unavailable to it, the Government could always bring an ordinary civil action to recover the damages which it had suffered.

barred a criminal prosecution, astute persons, guilty of defrauding the Government, might induce friendly interests to bring a penalty suit against them. Although the Government could prevent such an action from being discontinued without its consent (Section 3491), it could not control the litigation or force the plaintiff to prepare or present the case in the most effective manner or so as to insure the recovery of a judgment in his behalf. Once the case had gone before the jury, the Government would be barred from further action against the defendant. It is true that so long as a person's fraud remained undiscovered, he would probably not provoke an action against himself under Section 3490. But it is not at all beyond the realm of possibility that such an action might be instituted once a prospective defendant became aware that the Government was investigating his activities.[17]

If we assume that the offense of double jeopardy may be available in a suit not brought by the Government, two further questions are presented: (1) whether an action under Section 3490 is essentially civil or criminal; (2) if it is essentially criminal, whether the complaints in the instant cases charged the same offenses as the indictments under which respondents were convicted.

The first of these questions presents difficult considerations on which the authorities are not, in our

[17] Presumably such conduct would not avail him if discovered, but collusion would present difficulties of proof.

view, entirely clear. We believe, however, that the complaints in these cases do not charge the same offenses as the indictments, the latter having been based upon the general Conspiracy Act (in No. 173) and the Emergency Relief Appropriation Act of 1935 (in No. 236), rather than on R. S. 5438, or its lineal successors. Since it will be unnecessary to determine whether an action under R. S. 3490 is criminal or civil if the offenses charged are not the same, we will take up the question of identity of offenses first.

A. THE QUESTION OF IDENTITY OF OFFENSES

Whether an action under R. S. 3490 is essentially criminal need not be determined unless the offenses charged in petitioners' complaints are the same as those covered by the Government's indictments. Even in the case of two criminal proceedings there is no double jeopardy unless the offenses charged are the same (*Blockburger* v. *United States*, 284 U. S. 299, 304; *Gavieres* v. *United States*, 220 U. S. 338, 342–343).

The question of identity of offenses arises in these cases because the Government's indictments which first placed respondents in jeopardy were not founded on R. S. 5438 or its successors (18 U. S. C., secs. 80 and 83) but upon the general conspiracy statute, Section 37 of the Criminal Code (18 U. S. C., sec. 88), and Section 9 of the Emergency Relief Appropriation Act of 1935 (49 Stat. 115, 118).

The test as to whether two indictments for the same act but based on different statutes charge the same offense is "whether each provision requires proof of a fact which the other does not" (*ibid.*). In those cases this Court approved the statement of the highest court of Massachusetts in *Morey* v. *Commonwealth*, 108 Mass. 433, 434, that:

> A single act may be an offence against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.

Application of this rule to No. 236 reveals that Section 9 of the 1935 Relief Appropriation Act and R. S. 5438 create entirely separate offenses. The former statute and the indictment returned under it (No. 236, R. 35–37) [18] are concerned with the diversion of funds appropriated under the 1935 Relief Act for the benefit of persons not entitled thereto. R. S. 5438 on the other hand forbids the making of false claims, the use of a false document for the purpose of obtaining payment of a claim, and conspiracy to defraud by obtaining the payment of any claim. Argument is unnecessary to show that each of these statutes "requires proof of a fact which the other does not". Accordingly, though both the indictment and the complaint may

[18] Count 2 contains this charge. Count 1, which was based on the general conspiracy statute, 18 U. S. C., sec. 88, was nolle prossed (R. 59–60) and is not involved here.

be based upon the same transactions, respondents in No. 236 have not been twice put in jeopardy for the same offense.

The complaint in No. 173 is in substantially the same form as in No. 236. The indictment upon which the defendants were convicted, however, charged a violation of the Conspiracy Act, Section 37 of the Criminal Code, 18 U. S. C., sec. 88. This section provides that two or more persons shall be punished if they "conspire * * * to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy".

This statute clearly describes an entirely different offense from that defined in the first and second clauses of R. S. 5438. The offenses defined in those clauses require a claim, not a conspiracy, whereas section 88 is violated by a conspiracy and not by a claim.

A different problem is presented by the third clause of R. S. 5438, which prohibits entering into a conspiracy to defraud the United States "by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim." The quoted language defines the object of the conspiracy. Since this particular object would have to be proved under this section and not under Section 37 the two offenses are not identical. On the other hand Section 37 requires an overt act, whereas this portion of R. S. 5438 does not. Ac-

cordingly, here too it can be said that each statute requires proof of a fact which the other does not.[19]

For these reasons we are of the opinion that the complaints in these two cases do not charge the same offenses as did the indictments and for that reason alone the respondents have not been twice put in jeopardy for the same offense.

B. IS A SUIT UNDER SECTION 3490 ESSENTIALLY CIVIL OR CRIMINAL?

If the Court should conclude that the complaints charged the same offenses as the preceding

[19] Respondents argue that the indictments which were *nolle prossed* charged the same offenses as those set forth in the complaints; that the *nolle prosse*, together with the pleas of *nolo* to the other indictment in No. 173, and to the other count in No. 236, constituted a compromise with the Government; and that under *United States* v. *Chouteau*, 102 U. S. 603, they are protected against further proceedings on all compromised offenses. We cannot agree that an indictment or count dismissed before trial places a defendant in jeopardy within the meaning of the Constitution, and we believe that the *Chouteau* case must be limited to the peculiar situation there before the Court in which a formal legal compromise had been approved by the Attorney General and the Secretary of the Treasury. In any event, the indictments dismissed in No. 173 (see R. 323-329) appear to charge an offense under Section 35 of the Criminal Code (18 U. S. C., sec. 80) substantially the same as that described in the second clause of R. S. 5438, but not the same as those defined in the first and third clauses. The first count of the indictment in No. 236 (R. 26-34), which was also *nolle prossed*, charges a violation of the Conspiracy Act (Criminal Code, Section 37, 18 U. S. C., sec. 88). This count is substantially the same as the main indictment in No. 173, and for the reasons set forth in the text, we do not think the Conspiracy Act charges an offense identical with that described in Section 5438.

indictments, it will be faced with the question of whether the principle of double jeopardy applies to actions brought under R. S. 3490.

In a series of cases of which the most recent is *United States* v. *La Franca*, 282 U. S. 568, it has been held that various types of penalties, though recoverable in civil actions, are still "a punishment for the infraction of the law," with the result that "a former acquittal or conviction may be invoked to protect against a second punishment for the same offence" (*id.* at 573–574; *United States* v. *Chouteau*, 102 U. S. 603; *Coffey* v. *United States*, 116 U. S. 436; *United States* v. *McKee*, 26 Fed. Cas. No. 15,688 (C. C. E. D. Mo.); *United States* v. *Gates*, 25 Fed. Cas. No. 15,191 (S. D. N. Y.); *United States* v. *Glidden Co.*, 78 F. (2d) 639 (C. C. A. 6), certiorari denied, 296 U. S. 652; cf. *United States* v. *Glidden Co.*, 119 F. (2d) 235, certiorari denied, 314 U. S. 678).[20]

In the most recent pronouncement on the subject, *Helvering* v. *Mitchell*, 303 U. S. 391, the Court, after comprehensibly reviewing the previous authorities, adopted a somewhat different approach. The Court declared that (p. 399) "Congress may impose both a criminal and civil sanction in respect of the same act" and that the question as to whether a criminal sanction was imposed

[20] These cases do not consider whether the offenses previously charged were identical, but assume that they were. We assume that the rule as to the necessity of identical offenses is the same for a penalty suit following an indictment as for two indictments.

"is one of statutory construction." The crucial distinction, which the Court conceded had not theretofore "generally been specifically enunciated," was "between sanctions that are remedial and those that are punitive" (*id.*, at 400n). If Congress intended that a sanction be primarily remedial, the severity of the penalty would not be controlling (*id.*, at 400). The payment of sums of money was cited as illustrative of the type of sanction "enforcible by civil proceedings" (*ibid.*). Such a requirement was treated as remedial even though the payment was to be double the value of the Government's loss, since the additional recovery would "reimburse the Government for the heavy expense of investigation and the loss resulting from the * * * fraud" (*id.*, at 401, citing *Stockwell* v. *United States*, 13 Wall. 531).[21]

The provision for double damages in Section 3490 can clearly be classed as remedial, to the same extent as the sanction upheld in the *Stockwell* case. Even when half of it goes to the informer, its effect is to reimburse him for the cost of the investigation which he has undertaken in the place of the Government.[22] The provision for the forfeiture of $2,000 can be treated as in the same category, and

[21] The above language referred to frauds by taxpayers, but we see no reason why it is not equally applicable to persons who defraud the United States Treasury by other means.

[22] That is not true, of course, in cases such as these, when the Government has completed its investigation and the informer's case is based upon the facts revealed by the Government's prior inquiry.

also as a means to provide a motive for suing in cases where the actual loss is so small that a suit to recover it alone would hardly be justified. But the forfeiture may also be regarded as having the attributes of a fine or punitive exaction. We are inclined to the view that the forfeiture, at least, is more closely akin to the penalties held to be criminal in nature in the *La Franca* case and its predecessors than to the fifty percent "Addition to the Tax" held to be a civil sanction in the *Mitchell* case.

The *Mitchell* case, however, declares that the question is one of statutory construction; if this is so, the intention of Congress in enacting the particular statute must be controlling. It would accordingly be unnecessary to match the sanctions here imposed with those considered in other cases to see which afford the closest parallel.

The legislative history of the Act of March 2, 1863, 12 Stat. 696, is illuminating in several respects. When the original bill was introduced in the Senate (S. 467, 37th Cong., 3d Sess.), Sec. 3, the predecessor to R. S. 3490, provided for a forfeiture of $2,000 and the payment of double damages. In the explanation given by Senator Howard, quoted *supra*, pp. 16–17 (Cong. Globe, 37th Cong., 3d Sess., pp. 955–956), he stated that these clauses prescribed a "mode of proceeding to punish persons", and provided the "most expeditious way * * * of bringing rogues to justice." There was an objection by Senator Cowan that

such acts should be made crimes and punished in the criminal courts by imprisonment, quasi-criminal prosecution being too lenient (*id.* at 954–955). Although this protest was ineffective in the Senate, the House amended Sec. 3 by adding at the end the words "And every such person shall, *in addition thereto,* on conviction in any court of competent jurisdiction, be punished by imprisonment not less than one nor more than five years", or by fine. [Italics supplied.] The amendment was passed without discussion (*id.* p. 1307) and the Senate concurred therein without debate (*id.* p. 1323).

When this Act was incorporated in the Revised Statutes in 1874, Sec. 3 became R. S. 3490, and the criminal sanction, along with similar provisions in Sec. 1, was transferred to R. S. 5438. These changes did not in any way alter the meaning of the provisions; the Revised Statutes were not intended to change the substance of the law, but to condense and consolidate it (2 Cong. Rec. 129, 646, 819, 820). Thus the intention of Congress in 1863 would still be controlling as to the meaning of the Act as embodied in the Revised Statutes.

We think it fair to infer from the above that Congress regarded the action for forfeiture and double damages as punitive, but not as criminal. Clearly the Senate intended the original statute, which failed to provide for fine and imprisonment, to be a method of punishment, and we doubt that this object disappeared with addition of the strictly

criminal sanction. On the other hand the House amendment makes it as clear as language can that offenders were to be punished by fine and imprisonment *in addition* to the other penalties. Since Congress was, of course, aware of the prohibition in the Fifth Amendment against twice being put in jeopardy, the requirement that both sanctions be used manifests a legislative understanding that only the second of the sanctions was criminal in nature. It would not be proper to attribute to Congress an intention that the statute be construed in a way which would make it unconstitutional on its face (*United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401; *United States* v. *Standard Brewery*, 251 U. S. 210, 220; *Baender* v. *Barnett*, 255 U. S. 224, 226). The assumption that the *qui tam* suit was civil in nature was probably based on earlier authorities treating such actions as civil proceedings. 1 Bac. Abr. (7th Eng. Ed., 1832), p. 87; *Commonwealth* v. *Churchill*, 5 Mass. 174, 175–176 (1809); *Atcheson* v. *Everitt*, 1 Cowp. 382, 391 (1776); *Cole* v. *Smith*, 4 Johns. (N. Y.) 193, 196 (1809). The provision against double jeopardy in the Fifth Amendment, as well as the 1863 Act, must be construed in the light of this well-established understanding that *qui tam* suits were not criminal.

There is thus presented a situation in which Congress intended the sanction to be civil, but also regarded it as punitive rather than remedial. The decisions before the *Mitchell* case and the line

drawn in that opinion between remedial and punitive sanctions would lead to the conclusion that the penalties found in R. S. 3490 are essentially criminal. The statement in the *Mitchell* case that the question is one of statutory construction, which implies that the intention of Congress is controlling, would lead to a contrary result, unless it means that the question with respect to which the statute must be construed is whether the sanction was intended to be remedial or punitive, not whether it was to be criminal or civil. We find it difficult to believe that the Court would accept as binding for constitutional purposes the intention of Congress that a sanction be civil without regard for the nature of the exaction.

Apart from the considerations of policy, discussed *supra*, pp. 46–48, we would probably reach the conclusion that an action under R. S. 3490 is punitive, at least when brought by the Government, and therefore, essentially criminal. We are reluctant to believe, however, that a suit by a private individual can bar the Government from enforcing the criminal law. We recognize the logical difficulty in differentiating between the two situations. The question, as presented in these cases, is in our opinion a close one, and we are uncertain as to how it should be answered. Since, if the Court agrees with our contention that the respondents were not twice put in jeopardy for the reason that the indictments and the complaints charge different of-

fenses, or if our interpretation of R. S. 3490 is adopted (see Point I, pp. 9–24, *supra*), a decision on this point will not be necessary, we do not feel compelled to state a definite conclusion on the present question.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
ROBERT L. STERN,
ROBERT C. BARNARD,
FRED E. STRINE,
K. NORMAN DIAMOND,
Attorneys.

DECEMBER 1942.

APPENDIX

A

Sections 3490–3493 of the Revised Statutes (12 Stat. 696, 31 U. S. C., Sections 231–234) read as follows:

Sec. 3490. Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title "CRIMES," shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.

Sec. 3491. The several district courts of the United States, the Supreme Court of the District of Columbia, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall, wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit. Such suit may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such

person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent.

SEC. 3492. It shall be the duty of the several district attorneys of the United States for the respective districts, for the District of Columbia, and for the several Territories, to be diligent in inquiring into any violation of the provisions of section thirty-four hundred and ninety by persons liable to such suit, and found within their respective districts or Territories, and to cause them to be proceeded against in due form of law for the recovery of such forfeiture and damages. And such person may be arrested and held to bail in such sum as the district judge may order, not exceeding the sum of two thousand dollars, and twice the amount of the damages sworn to in the affidavit of the person bringing the suit.

SEC. 3493. The person bringing said suit and prosecuting it to final judgment shall be entitled to receive one-half the amount of such forfeiture, as well as one-half the amount of the damages he shall recover and collect; and the other half thereof shall belong to and be paid over to the United States; and such person shall be entitled to receive to his own use all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided*, That such person shall be liable for all costs incurred by himself in the case, and shall have no claim therefor on the United States.

B

Section 5438 of the Revised Statutes, 12 Stat. 696, reads as follows:

> Sec. 5438. Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, or who, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, who, with intent to defraud the United States or willfully to conceal such money or other property, delivers or causes to be delivered, to any other person having authority to receive the same, any amount of such money or other property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other

paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, who makes or delivers the same to any other person without a full knowledge of the truth of the facts stated therein, and with intent to defraud the United States, and every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equipments, ammunition, clothes, military stores, or other public property, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, every person so offending in any of the matters set forth in this section shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars.

C

Section 37 of the Criminal Code (18 U. S. C., Section 88) reads as follows:

§ 88. (Criminal Code, section 37.) *Conspiring to commit offense against United States.*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

D

Section 9 of the Emergency Relief Appropriation Act of 1935, 49 Stat. 115, 118, reads as follows:

> Sec. 9. Any person who knowingly and with intent to defraud the United States makes any false statement in connection with any application for any project, employment, or relief aid under the provisions of this joint resolution, or diverts, or attempts to divert, or assists in diverting for the benefit of any person or persons not entitled thereto, any moneys appropriated by this joint resolution, or any services or real or personal property acquired thereunder, or who knowingly, by means of any fraud, force, threat, intimidation, or boycott, deprives any person of any of the benefits to which he may be entitled under the provisions of this joint resolution, or attempts so to do, or assists in so doing, shall be deemed guilty of a misdemeanor and shall be fined not more than $2,000 or imprisoned not more than one year, or both.

U. S. GOVERNMENT PRINTING OFFICE: 1942